MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-6434

OTIS REESE, Administrator of the Estate of Robert L. Reese, Deceased,
Petitioner,

v.

CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT, FRANK RAMON, Chief of Police of the City of Seattle, HAROLD G. LARSEN and ROBERTA LARSEN, husband and wife,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

THOMAS D. FREY of
GUTTORMSEN, SCHOLFIELD & STAFFORD
Counsel for Respondents

Office and Post Office Address:
820 White Henry Stuart Bldg.
Seattle, Washington 98101

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PETITION NOT PRINTED

SUBJECT INDEX

	Page
How Federal Question Is Presented	1
Statement of the Case	2
Questions Presented	5
Reasons Why Writ Should Not Be Granted	5
I. Was the Constitutional Issue Now Urged in Petitioner's Brief Timely Raised in the Courts Below?	5
II. Is There a Case or Controversy Within Article III of the United States Constitution? Is the Case Justiciable?	7
III. Is There an Independent and Adequate State Ground to Support the Decision of the Washington Courts?	10

TABLES OF AUTHORITY

Table of Cases

Bloeth v. State of New York, 369 U.S. 133, 82 S. Ct. 661 (1962)	6
Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822 (1963)	11
Flast v. Cohen, 295 U.S. 83, 88 S. Ct. 1942 (1968)	7
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	11
Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1128 (1958)	6
Herden v. Georgia, 295 U.S. 441, 55 S. Ct. 794 (1934)	6
Lear, Incorporated v. Adkins, 395 U.S. 653, 90 S. Ct. 1902 (1969)	6-7
Radio Station WOW v. Johnson, 326 U.S. 120, 65 S. Ct. 1475 (1944)	6, 11

Constitutional Provisions

Page

United States Constitution, Article III 5, 7

United States Constitution, Amendment XIV 1, 7

Statutes

RCW 9.11.040 10

Other Authority

Moral Penal Code § 3.07 9

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HOW FEDERAL QUESTION IS PRESENTED

The constitutional question presented in this Petition was never brought to the attention of the Trial Court, nor assigned as error in either of the petitioner's appeals to the State Supreme Court, even though that Court heard arguments en banc on two occasions. (This was due to one justice being appointed to the Federal District Court subsequent to the first argument.) Only a vague reference of an alleged violation of the Fourteenth Amendment due process clause was alluded to in the Petition for rehearing

to the State Supreme Court after that Court had rendered final decision. It was seven years after the filing of this action that the issue is raised for the first time by this Petition.

STATEMENT OF THE CASE

This is a civil action, a wrongful death case, brought by Otis Reese, as administrator of the estate of Robert L. Reese, deceased, against the named respondents. The action was commenced in December of 1965, and a verdict for defendants was reached on December 15, 1966. The plaintiff timely filed a notice of appeal (within 30 days), and then nothing was done to pursue the appeal for 3½ years until May 1970, when the plaintiff filed with the Clerk of the Superior Court a proposed statement of facts. A motion to dismiss the appeal was made and denied. Thereafter the matter was argued and the final judgment affirming the trial court was entered on December 26, 1972.

The factual background is as follows:

Officers Larsen and Junnel had been employed with the Seattle Police Department for approximately four and one-half and ten years, respectively prior to this incident (St. 285, 30). On June 19, 1965, the officers, who had been working as partners, completed their shift at 8:00 p.m., having started at 12:00 noon (St. 287). They prearranged to meet their wives at a restaurant named "Louie's" for an evening out.

They had changed from their uniforms to sportshirts, but had left on their blue uniform trousers (St. 35, 287). Both officers were carrying their weapons as required by police regulations (St. 34). The officers met their wives at "Louie's"

Restaurant and from there went to two other restaurants named "Budnick's"and "The Golden Door." During this time, the officers had consumed four to five cocktails over a period of approximately five hours (St. 288-291, 38-46). The testimony of Officer Demming (St. 508), and Officer Marion (St. 574), as well as the officers themselves and their wives, clearly indicated that none of them were significantly affected by the beverages which they had consumed (St. 292).

The officers and their wives arrived at the Linyen Cafe at about 1:00 a.m. on the morning of June 20, 1965, and seated themselves in the last booth in the back and were served in about fifteen or twenty minutes (St. 293).

Shortly after the officers and their wives were served, a group of black men walked up to their table and, without provocation, administered a brutal beating to the officers.

As stated by Mrs. Larsen, the following occurred:

> "Anyway, they came up to the table and I don't remember if they said anything or what, all I remember is that I believe Frank got hit in the face first and one of them was by my husband. The next thing I see a fist coming. He had his head down and it ended somehow right in his mouth, and the next thing I see this plate coming and I kind of held my hands over my head. It hit him on the head. At this time all his glasses shattering, so I turn myself to the wall and I felt his shoulder in my lap. I thought they killed him or done something to him, but all of a sudden I turned around and the glass had kind of come quick, you know, there wasn't so much glass falling around. So I turned back around and at this point I see Frank trying to get up out of the booth. At this time two Negroes grabbed him by his arms like they were going to hold on to him and another hit him, and he fells down right under the table. That is when I noticed that my husband is here on my lap and I jump up. All of a sudden his head falls

down and I start screaming just as loud as I can, "Please don't hit him! What have we done to you? Please stop." And at this time, my husband is beginning to try to get up out of the booth. He looks dazed and real funny to me and this one Negro is swearing very violently at me because I am telling him Marjorie is pregnant, not to hit Frank anymore, to stop. Another Negro is trying to pull, he has got his fist like he is going to slam me one. This is all that I can remember." (St. 472, 473)

Officer Larsen was rendered unconscious falling over into his wife's lap (St. 327, 328) and received a cut on the back of his head, as well as numerous cuts on his arms and legs, and was covered with blood (St. 583). Officer Junnel received numerous cuts and bruises and his face and arms were swollen (St. 332).

That the beating was unprovoked was testified to by the officers (St. 325, 599), as well as the testimony of Mr. and Mrs. Nagamatsu who were seated one booth away (St. 525, 526, 577).

After the officers had been thoroughly beaten and severely injured, their assailants, one of whom was Robert Reese (St. 454), left the cafe. The officers followed and were joined outside the cafe by Officers Marion and Deming, who had been summoned by a waiter from the cafe (St. 536). By this time, the assailants had started running up the street and Officer Larsen identified himself at least three times as a police offiicer and ordered the assailants to stop (St. 329, 330, 412, 414, 420, 537, 538, 539). The decedent, Robert Reese, and his companion failed to stop and, instead, continued running up to the parking lot adjacent to the Four Seas Restaurant. Officer Larsen reached the parking lot just as the decedent and Mr. Osborne Moore began driving out of the lot at a very high rate of speed (St. 507).

At this point, Officer Larsen, in the belief that a felony had been committed and that he had no other way of stopping his assailants, drew his service revolver and fired at the vehicle, attempting to disable it (St. 600). One of the shots fired at the vehicle struck and killed Robert Reese who was riding as a passenger. Osborne Moore, the driver of the vehicle, took Mr. Reese to the hospital and, while there, told a Seattle Police Officer, "It is all my fault. Why did it have to happen." (St. 191, 192). It should be remembered that Mr. Moore was the individual who had called the Reese apartment and summoned the individuals who were ultimately involved in the tragic and brutal beating of the officers (St. 175).

QUESTIONS PRESENTED

I. Was the constitutional issue now urged in petitioner's brief timely raised in the Courts below?

II. Is there a case or controversy within Article III of the United States Constitution? Is the case justiciable?

III. Is there an independent and adequate state ground to support the decision of the Washington Courts?

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. Was the Constitutional Issue Now Urged in Petitioner's Brief Timely Raised in the Courts Below?

The constitutional issues now urged in the Petition for a Writ of Certiorari were not timely raised in the Courts below.

The first time, the plaintiffs squarely raised the issue of due process under the United States Constitution was in a petition for a rehearing before the Washington State Su-

preme Court. The applicable rule of law is that this issue was not timely raised. In *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794 (1934), this Court said:

> "The federal question was never properly presented to the State Supreme Court unless upon motion for rehearing; and that Court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the Court actually entertains the question and decides it. [citing cases]."

One exception to this general rule is where the ruling on a petition for rehearing gives a construction to a statute which is both unanticipated and which threatens constitutional rights. *Herndon, supra.*

As stated in *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475 (1944):

> "Questions first presented to the highest state court on a petition for rehearing come too late for consideration here, unless the state court exerted its jurisdiction in such a way that the case could have been brought here had the question been raised, prior to the original disposition. [citing cases]"

Citing *Radio Station WOW, supra,* the Court in *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1958) held that the Supreme Court would not review a question which was raised for the first time in the State Court on a petition for rehearing. See also *Bloeth v. State of New York*, 369 U.S. 133, 82 S.Ct. 661 (1962), and *Lear, Incorporated v. Adkins*, 395 U.S. 653, 89 S.Ct. 1902 (1969), White Concurring.

In *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98 (1932). The Court stated:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous

contentions, it is urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claims there made cannot serve as a basis for review of this court. The contention that a federal right had been violated rests on the action of a trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment."

II. Is There a Case or Controversy Within Article III of the United States Constitution? Is the Case Justiciable?

The issue that petitioner in the civil action would have this Court decide is, as to petitioner, an advisory opinion.

As was said in *Flast v. Cohen*, 295 U.S. 83, 88 S.Ct. 1942 (1968):

> "And it is quite clear that 'the oldest and most consistent threat in the federal law of judiciability is that the federal courts will not give advisory opinions.' See Wright, Federal Courts 34 (1963). Thus, the implicit policies embodied in Article 3, and not history alone, imposed the rule against advisory opinion on Federal Court."

Petitioner contends that the use of the felony-misdemeanor dichotomy, as a basis for a police officer's judgment as to the amount of force he is permitted to use in any given situation, deprived petitioner's deceased of due process of the law under the Fourteenth Amendment to the United States Constitution.

Assuming arguendo that petitioner's legal contention could be accepted, his brief all but concedes that, as to the

deceased, the factual circumstances as found by the trial court surrounding this incident make such contentions inapplicable.

The Washington State Supreme Court found that the evidence as to the injuries sustained by the police officers supported the jury instruction of "grievous bodily harm." The Court said:

> "The plaintiff contends the evidence in this case was insufficient to support an instruction on grievous bodily harm. We disagree. The definition of grievous bodily harm in the Court's instruction nos. 5 and 6, *supra*, are in conformity with our definition in *State v. Linton*, 36 Wn.2d 67, 95, 216 P.2d 761 (1950):
>
> "The words 'grievous bodily harm' include any hurt or injury calculated to interfere with the health or comfort of the person injured; it need not necessarily be an injury of a permanent character. By 'grievous' is meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature."
>
> "The jury could have found from the evidence most favorable to the plaintiff, that the attack upon the officers was so severe that they were left momentarily unconscious, and that Officer Larsen sustained a three-inch laceration of his posterior scalp. That the laceration was probably caused by an object other than a fist is corroberated by the testimony of Mrs. Larsen, who stated she observed the striking of Officer Larsen by a plate, and by the evidence of the pieces of a broken plate in the area where the assault occurred. This is also evidenced by the testimony of Dr. Penny that the laceration was not likely to have been caused by a fist. That in addition, the jury could have found Officer Larsen sustained multiple bruises about the face; that both eyes, his upper lip and nose were swollen; that a tooth was knocked out, and that he sustained fractures of his left seventh and eighth ribs. This clearly was sufficient evidence which, if believed by the jury, would have come within the ambit of

grievous bodily harm, and justify the trial court giving instruction nos. 5 and 6, *supra*."

Thus, the injuries sustained by the police officers were found to be grievous and as such, endangered their lives.

Petitioner's brief argues that the felony misdemeanor dichotomy is irrational and should be abandoned in favor of a standard which would allow the use of deadly force only when the accused's acts endanger life or, alternatively, when the accused's acts were inherently dangerous.

Petitioner's brief (at p. 11), quotes, for example, from the comments to Section 3.07 of the Model Penal Code:

> "Moreover, under modern legislation, many statutory misdemeanors involve conduct more dangerous to life and limb than some felonies. Compare, for example, such felonies as the distillation of alcohol in violation of the revenue laws, on the one hand, and such misdemeanors as reckless and drunken driving on the other. Even a felony which often is committed in such a way as to endanger life, may in many particular cases be committed in a fashion which creates no such peril. Accordingly, the felony-misdemeanor distinction is inherently incapable of separating out those persons of such dangerousness that the perils arising from failure to accomplish immediate apprehension justify resort to extreme force to accomplish it." (emphasis added).

Further, petitioner in his brief at page 11 states that,

> "Unless society's interest in the apprehension is great because of the inherent dangerousness of the alleged activity, the suspect's right to live has been accorded flimsy protection."

Although petitioner disclaims arguing for any one of the tests mentioned in his brief (see page 14 of petitioner's brief), it is clear that under any formulation, the facts, as found by the Washington Court, support the conclusions

that the deceased was not deprived of due process of the law by the response of the police officers to the severe assault committed upon them.

III. Is There an Independent and Adequate State Ground to Support the Decision of the Washington Courts?

The propriety of the deliberate use of lethal force by a police officer, in order to prevent the escape of one suspected of having committed an inherently dangerous act imperilling life, was not the dispositive issue in the Washington Court.

The undisputed testimony at trial was that Officer Larsen did not intend to use lethal force upon any person, but intended only to disable the vehicle in which the deceased was riding. The use of force, in whatever degree, to disable the vehicle, regardless of whether its occupants had committed a serious felony or a misdemeanor, is the lawful duty of a police officer. RCW 9.11.040 provides, for example, that:

> "The use, attempt, or offer to use force upon or toward the person of another shall not be unlawful in the following cases:
>
> (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting him and acting under his direction; . . ."

The force used to stop the vehicle cannot be termed 'lethal,' nor was it the intent of Officer Larsen to injure the occupants of the vehicle.

In regard to this question, the opinion of the Washington Supreme Court contains the following language:

> "The plaintiff contends the Court erred in giving instructions nos. 2 and 4, relating to excusable homicide.

The plaintiff argues this would be proper only where the homicide was by accident or misfortune. The plaintiff was correct in that the firing of the gun was not by accident, but the evidence is clear from the testimony of Officer Larsen, which the jury was entitled to believe, that he aimed at the tires intending to disable the vehicle in which the two occupants were fleeing, and that the shooting of Reese was not intended. The elements of accident or misfortune were therefore a part of the evidence in the case, and the instructions on excusable homicide were properly given."

It was already a "settled rule" by 1935 in *Fox Film Corp. v. Muller*, 296 U.S. 207, that,

> ". . . where the judgment of a state court rests upon two grounds, one of which is federal, and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." See also *American Surety v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98 (1932), cited with approval in *Zorach v. Clauson*, 343 U.S., 306, 311, footnote 7 (1951).

Similarly, in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963), the Court said as to direct appellate review:

> "It is a familiar principle that this court will decline to review state court judgment which rests on independent and adequate state ground, notwithstanding the co-presence of federal grounds." See also *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475 (1944)."

The State Court in the instant case held that there was excusable homicide on the part of Officer Larsen. Under the state law an officer's duty is to use reasonable force to prevent the escape of a fleeing suspect. Officer Larsen directed his force against the vehicle, and did not intend to harm the deceased. The force vis-a-vis the vehicle was reasonable while the death of the deceased was found to be

accidental and excusable. Based upon the foregoing authorities it is respectfully urged that the petition should not be granted.

Respectfully submitted,

THOMAS D. FREY of
GUTTORMSEN, SCHOLFIELD & STAFFORD
Counsel for Respondents